* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgement reserved on: 01.02.2024
% Judgement pronounced on : 10.04.2024

\+ **FAO(OS) (COMM) 195/2022 & CMAPPL. 32865/2022**

M/S COBRA INSTALACIONES Y SERVICIOS, S.A & SHYAM INDUS POWER SOLUTION PVT LTD. (J.V.) ..... Appellant
Through: Mr Pankaj Kumar Singh and Ms Bimla Sharma, Advocates.

versus

HARYANA VIDYUT PRASARAN NIGAM LTD.(HVPNL) ..... Respondent
Through: Ms Geeta Luthra, Senior Advocate, with Mr Akhil Ranganathan, Ms Pragati Srivastava, Mr Rishabh Dahiya and Ms Shivani Luthra Lohiya, Advocates.

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MR JUSTICE AMIT BANSAL

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.:

Prefatory facts:

1. This appeal is directed against the judgment of the learned Single Judge dated 25.04.2022. *Via* the impugned judgment, the learned Single Judge reversed the arbitral award dated 29.07.2020 to the extent of award of liquidated damages (hereafter referred to as "L.D. ") and the interest payable thereon.

2. It is pertinent to note that the learned arbitrator had awarded a refund

of 50% of the L.D. imposed by the respondent, i.e., Haryana Vidyut Prasaran Nigam Ltd. [hereafter referred to as "HVPNL"]. The amount retained as L.D. by HVPNL was Rs.7,25,01,510/-. Therefore, as per the award, the appellant, i.e., Cobra Instalaciones Y Servicios, S.A. & Shyam Indus Power Solution Pvt. Ltd. (J.V.) [hereafter referred to as "J.V. Company"] was entitled to a refund of Rs.3,62,50,755/-.

2.1 In addition, the learned arbitrator awarded interest at the rate of 13% per annum from the date of deduction of L.D. up until 04.01.2019, which was the date of institution of the Statement of Claims [SOC]. This amount was quantified as Rs.2,27,49,710/-.

2.2 The learned arbitrator also awarded *pendente lite* and future interest at the rate of 9% per annum. The future interest was to be calculated on the sum awarded, which included the *pendente lite* interest, and would run from the date of the award until the date of payment.

3. We may note at the very outset that at the hearing held on 27.07.2022, the counsel for the J.V. Company, i.e., Mr Pankaj Kumar Singh, confined the challenge in the instant appeal to the extent the learned Single Judge had set aside the award *qua* L.D. As noticed above, *via* the award, the J.V. company was granted a refund of 50% of L.D., along with interest.

4. With this preface, one would like to set out the backdrop against which discord has arisen between the disputants.

5. The disputants had entered into five contracts, including the subject contract. HVPNL assigned the five contracts different project numbers. The J.V. Company thus executed the following projects: G14A, G17, G19A, G19B and G09. The project which is the subject matter of the instant appeal is G09. Concededly, disputes had arisen vis-à-vis all five projects. The

disputes vis-à-vis these projects were referred to a sole arbitrator. The sole arbitrator rendered two awards of even date, i.e., 29.07.2020. The first award dealt with Project G09, while the second award of even date concerned the remaining four projects, i.e., G14A, G17, G19A, and G19B.

6. Significantly, the record shows (something that has emerged from the cross-examination of HVPNL's witness) that in two projects, i.e., G14A and G17, the entire amount of L.D. deducted on account of delay was refunded while in Projects G19A and G19B, a small amount was retained as L.D. These details are set forth hereafter:

Particulars of the Project	Amount of L.D. Deducted	Amount of L.D. refunded to the J.V. Company	Amount of L.D. retained by HVPNL
G14A	Rs. 56,71,466	Rs. 56,71,466	Nil
G17	Rs. 1,44,83,710	Rs. 1,44,83,710	Nil
G19A	Rs. 1,65,23,492	Rs. 1,64,09,733	Rs. 1,13,763
G19B	Rs. 2,02,96,262	Rs. 1,95,10,412	Rs.7,85,850

7. However, as indicated above, insofar as the subject project, G09, is concerned, Rs.7,25,01,510 was retained by HVPNL towards L.D. The said amount was the maximum amount that was recoverable in terms of Clause 26 of the Particular Condition [P.C.] read with Clause 26.2 of the General Conditions of the Contract [GCC].

7.1 In other words, as per HVPNL, since the execution of Project G09, which comprised three substations and six bays, was delayed by 326 days,

the total amount of L.D. calculated at the rate of 0.5% per week of the project's value came to Rs.16,85,66,010 [i.e., 23.2% of the project's value], which had to be scaled down in terms of Clause 26.2 of the P.C. to 10% of the project's value, i.e., Rs.7,25,01,510/-.

8. The broad facts concerning project G09 are the following.

9. Like the other four contracts, *qua* Project G09, the Government of India [GOI] had received a loan from the International Bank for Reconstruction and Development [IBRD] to improve the infrastructure and power situation in the State of Haryana. This project was called the Haryana Power System Improvement Project.

10. HVPNL invited bids under the G09 project on 26.05.2011 on a turnkey basis, i.e., for procurement of plant, design, supply, and installation of the three (03) sub-stations and six (06) bays. Two sub-stations were required to generate power equivalent to 220 kV. They were located at Hukmawali (Ratia) and Sonta, while the third sub-station, which was to be located in Naneola, was to have the capacity to generate power equivalent to 66 kV.

11. The J.V. Company, in response to the tender, submitted its bids on 06.08.2011. Upon being declared as the successful bidder, two Letters of Acceptance [LOAs] of even date, i.e., 29.02.2012, were issued in favour of the J.V. Company. The contract price of the first LOA of even date was USD 10,07,137.96/- for plant and mandatory spares supplied from outside the country and Rs.57,54,47,672.20/- for plant and mandatory spares provided domestically. In addition to it, taxes were quantified at Rs.75,91,655/-. Insofar as the other LOA of even date was concerned, the contract price was fixed at Rs.6,72,15,345.12/-.

12. The commencement date of Project G09 was 08.04.2012 which, as per the contract, had to be completed within 450 days, i.e., by 27.06.2013.

13. The record discloses that in each of the sub-stations, there was a delay beyond the date of deemed commissioning. The details concerning the same, as emerging from the award, are set forth hereafter:

10. This project was started on 08.04.2012 by the Claimant and as per the Schedule in the contract, the work was to be completed by 03.07.2013 i.e. within 450 days. (the actual date is 27.06.2013). However, due to various reasons which according to the Claimant were beyond its' control, the project was completed with some delay. Dates on which the various Sub-Stations were completed, deemed to be commissioned and actually commissioned according to the Claimant are as under:

Place	***Date of Completion***	***Date of deemed commissioning***	***Date of actual commissioning.***
Sonta	*31.03.2014*	*26.06.2014*	*03.08.2015 & 09.05.2016*
Hukmawali	*29.05.2014*	*16.06.2014*	*23.04.2016*
Naneola	*28.02.2014*	*11.06.2014*	*03.07.2015*

14. The record shows that on 09.04.2012, HVPNL had awarded the contract for laying down the feeding /transmission line to an entity named Hythro Power Corporation Ltd. [hereafter referred to as “Hythro”]. Since Hythro failed to commence work under the contract awarded to it, HVPNL terminated it and floated a fresh tender on 26.02.2014. Besides this, Hythro was blacklisted on 07.02.2014. Under the fresh tender, the work concerning the feeding/transmission line was awarded, in the first instance, to an entity named Isolex and, after that, to one K. Ramarao, who finally completed the

work.

15. Regarding the delay in the execution of the project, correspondence was exchanged between the disputants. The significant communications which emanated from the J.V. Company are dated 20.06.2013, 24.09.2013, 03.11.2014, 08.09.2015, and 10.03.2016. *Via* communication dated 20.06.2013, the J.V. Company sought deferment of imposition of L.D. and agreed to pay interest calculated at SBI rate plus 3%, provided it was ultimately found liable to pay L.D. Likewise, the J.V. company made a request for an interim extension of time *via* a letter dated 24.09.2013.

16. *Via* letter dated 03.11.2014, the J.V. Company asserted that since HVPNL had not suffered an actual loss, L.D. could not be levied. The assertion was that the commissioning of the subject sub-stations was dependent on the availability of feeding lines. The J.V. Company reiterated this stand *via* its letter dated 08.09.2015 and 10.03.2016. *Via* these letters, not only did the J.V. Company lodge a plea objecting to the imposition of L.D., but also requested HVPNL to condone the delay and grant an extension of time to complete Project G09.

17. The record shows that HVPNL, *via* letter dated 26.07.2013, conveyed to the J.V. Company that it would defer 80% of the imposable L.D. till 31.12.2013 *albeit* without prejudice to its rights under the subject contract. The record also discloses that several letters were addressed to the J.V. Company to expedite the execution of the Project between July 2012 and April 2013.

18. Evidently, the request made by the J.V. Company for an extension of time was withdrawn *via* communication dated 10.09.2016 on the ground that a fresh request would be made for the extension of time by including

additional facts.

19. Since a fresh request was not made, HVPNL addressed letters dated 05.10.2016 and 08.01.2017 to the J.V. Company, asking it to make a fresh application for an extension of time, *albeit* by 25.01.2017. The J.V. Company, however, made a request for extension of time regarding two sub-stations [i.e., Naneola and Sonta sub-stations], and concerning six (6) bays on 24.04.2018. Although the J.V. Company had contended before the learned arbitrator that it had made a request for an extension of time even for the third sub-station located at Hukmawali, relevant correspondence was not placed on record.

20. It appears that HVPNL after 27.06.2023, commenced deduction of L.D. from the running bills.

21. Meanwhile, the J.V. Company invoked the arbitration agreement, which was embedded in Clause 46.5(b) of the GCC and Clause 46.5 of the P.C., on 04.11.2016. Although HVPNL sought consent from the J.V. Company for having its managing director appoint a sole arbitrator *via* communications dated 02.02.2017 and 24.11.2017, the J.V. Company declined the request. This resulted in the J.V. Company moving this Court for appointment of an arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 [in short, "1996 Act"]. *Via* an order dated 25.10.2018, this Court appointed a sole arbitrator not only concerning the disputes emanating from Project G09 but also, as indicated above, with regard to the other four projects.

22. The award concerning Project G09 failed to satisfy the disputants; hence, the J.V. Company and HVPNL preferred two cross-petitions under Section 34 of the 1996 Act in and about November 2020 and September

2021, respectively. The learned single judge disposed of both Section 34 petitions preferred by the disputants *via* a common judgment dated 25.04.2022.

22.1 Significantly, only the J.V. Company has preferred an appeal against the judgment of the learned Single Judge.

Submissions made by counsel:

23. Against this backdrop, submissions were advanced on behalf of the J.V. Company and HVPNL.

24. On behalf of the J.V. Company, the arguments put forth by Mr Pankaj Kumar Singh can be broadly paraphrased as follows:

(i) HVPNL had not suffered any legal injury or loss and, therefore, was not entitled to impose L.D.

(ii) Clause 26.2 of the GCC, which dealt with L.D., did not mention that they were genuine pre-estimates of losses that were likely to be suffered by HVPNL in case the J.V. Company breached its obligations under the contract.

(iii) Concededly, there was a delay in laying the feeding/transmission lines which is why the period obtaining between the installation of the sub-stations and bays and the actual commissioning of the plant was condoned by HVPNL.

(iv) It is well-established that L.D., if calculable or quantifiable, should be proved; in that sense, they are no different from ordinary damages leviable under Section 73 of the Indian Contract Act, 1872.

(v) It is evident upon a perusal of paragraph 7.2.6 of the SOD that although HVPNL had adverted to various heads under which it had suffered injury/loss, it had failed to quantify the same, an aspect which the learned

arbitrator noticed in paragraph 68 of the award.

(vi) The learned arbitrator, having regard to the fact that Project G09 enured to the benefit of the public at large, had ruled that even though HVPNL had failed to quantify the losses suffered by it on account of the delay attributable to the J.V. Company, 50% of the L.D. imposed by HVPNL could be retained by it based on the methodology adopted by the Supreme Court in ***Construction and Design Services v. Delhi Development Authority***, (2015) 14 SCC 263.

(vii) The learned Arbitrator, having appreciated the material/evidence placed before it, had concluded with regard to the quantum of L.D. that HVPNL could retain 50% of the L.D. stipulated in the agreement; a finding that could not have been reversed by the learned Single Judge while exercising powers under Section 34 of the 1996 Act. The learned Single Judge erred in holding that there was an inconsistency in the award rendered by the learned arbitrator as, on the one hand, he held that HVPNL couldn't determine damages with precision, on the other, ordered reduction in the L.D. made by HVPNL to the extent of 50%.

(vii) (i) This observation of the learned Single Judge ignores the findings returned by the learned arbitrator in the award. A careful perusal of paragraphs 67 and 68 of the award would show that the learned arbitrator returned the following findings of fact:

(a) Two or more contractors had been assigned different legs of the same project, therefore delay cannot be attributed solely to one contractor. The damages can be imposed on any one contractor only on *pro rata* basis.

(b) The HVPNL had not calculated the actual loss that could be attributed to the J.V. Company.

(b) It was not possible to quantify the losses referred to in paragraphs 7.2.6 (a)(i) to (v) and 7.2.6(b) of the SOD, mainly because other contractors were also involved in the execution of Project G09.

(c) It was possible to give a rough estimate of the losses suffered on account of Foreign Exchange Rate Variation (FERV) and proportionate expenses incurred *vis-à-vis* salary paid to the staff deployed to monitor the project and expenses incurred on maintaining vehicles.

(f) The entire delay after the deemed commissioning date had to be condoned by HVPNL as the J.V. Company was not responsible for the delay. Furthermore, a certain period of delay prior to the deemed date of commissioning was condoned, wherever it was attributable to HVPNL.

(viii) In sum, the learned arbitrator's appreciation of the evidence led him to conclude that the L.D., in this case, did not represent a genuine pre-estimate of damage or loss that HVPNL was likely to suffer in case of a breach committed by the J.V. Company. Furthermore, it was the learned arbitrator's conclusion, *albeit* after appreciating the material on record that at least part of the damages, loss, or injury suffered by HVPNL was quantifiable. It is in this context that the learned arbitrator concluded that only 50% of the damages imposed towards L.D. could be retained by HVPNL. The learned Single Judge had missed this vital point.

(ix) In support of his conclusion, the learned arbitrator had employed the principle enunciated by the Supreme Court in the ***Construction and Design Services*** case. In that case, the Supreme Court, having regard to the fact that the project being executed had a larger public interest, based on "guesswork", permitted retention of 50% of the damages imposed by the employer/contractee.

(x) The learned Single Judge grievously erred in distinguishing the judgment rendered by the Supreme Court in the ***Construction and Design Services*** case by observing that it was passed by the Court while exercising powers under Article 142 of the Constitution. A careful perusal of the judgment would show that the court made no such observation.

25. On the other hand, Ms Geeta Luthra, learned senior counsel, who appeared on behalf of HVPNL, refuted the submissions advanced by Mr Singh. Ms Luthra advanced the following arguments in support of the impugned judgment:

(i) The power of the Court under Section 37 of the 1996 Act does not extend to re-appreciation of the evidence. The impugned judgment is both reasoned and just and, therefore, should not be disturbed. [See ***PSA Sical Terminals Pvt. Ltd. vs The Board of Trustees of V.O. Chidambranar Port Trust, Tuticorin and Ors***, 2021 SCC OnLine SC 508; ***Swan Gold Mining Ltd. vs Hindustan Copper Ltd***, (2015) 5 SCC 739; ***Navodaya Mass Entertainment Ltd. vs J.M. Combines***, (2015) 5 SCC 698; ***Ssangyong Engineering and Construction Company vs NHAI,*** (2019) 15 SCC 131]

(ii) In the appeal, the J.V. Company seeks to contend that since HVPNL was unable to quantify the actual loss or injury suffered by it, 100% of the L.D. retained by it should have been refunded. This contention is misconceived as in the proceedings held before this Court on 27.07.2022, the J.V. company had indicated *via* its counsel, i.e., Mr Singh, that the appeal is confined to the reversal of the award whereby the learned arbitrator had directed a refund of 50% of the L.D. to the J.V. Company. Besides this, it is well-established that courts do not have the power to modify the award; they should either uphold or set aside the award [See ***The Project Director,***

National Highways No. 45E and 220 & Anr vs M. Hakeem & Anr, 2021 SCC OnLine SC 473; ***DHBVN vs. Navigant Technologies Pvt. Ltd***., 2021 SCC OnLine SC 157; ***McDermott International Inc. vs. Burn Standard Co. Ltd.***, (2006) 11 SCC 181].

(iii) The J.V. Company was in breach of the obligations undertaken by it under the subject contract. The execution of the contract had to take place within 450 days. The essence of the contract was the timely completion of the task undertaken by the J.V. Company. The delay in the completion of the contract should be attributable to the J.V. Company. Therefore, the judgment rendered by the learned Single Judge ought not to be interfered with.

(iv) HVPNL is a public-sector undertaking. Project G09 was undertaken with the sole purpose of benefiting the public at large. There was a delay in commissioning the three sub-stations, which is evident upon comparison of the deemed commissioning date with the actual commissioning date, as set forth hereafter:

Sub-station	Deemed date of commissioning	Actual date of commissioning
Sonta	26.06.2014	03.08.2015 & 09.05.2016
Hukmawali	16.06.2014	23.04.2016
Naneola	11.06.2014	03.07.2015

(v) The fact that HVPNL suffered damages is evident from the perusal of paragraph 7.2.6 of the SOD. Therefore, the argument advanced on behalf of the J.V. Company that HVPNL did not suffer any injury or loss is contrary

to the facts on record.

(vi) The L.D., as provided in Clause 26.2 of the GCC read with Clause 26.2 of the P.C., envisaged that the L.D. were a genuine pre-estimate of the loss that HVPNL would suffer if the J.V. Company breached its obligation(s) under the contract. The fact that the L.D. provided in the aforementioned clause represented a genuine pre-estimate of the extent of loss or injury that HVPNL would suffer is also evident from the appellant's conduct. The appellant, *via* its letter dated 20.06.2013 addressed to HVPNL, had sought deferment of L.D. Thus, the objection taken to the deduction of L.D. was a mere afterthought. In any event, both the SOD and the affidavit of evidence of RW-1 would show that it has always been a stand of HVPNL that the L.D. provided in the contract represented a genuine pre-estimate of injury that HVPNL was likely to suffer in case the J.V. Company committed a breach of its contractual obligations.

(vii) The HVPNL flagged the delay in executing the contract on multiple occasions. This aspect emerges upon perusing the letters/communications sent by HVPNL on the following dates: 04.07.2012, 03.08.2012, 13.08.2012, 27.08.2012, 25.09.2012, 03.10.2012, 12.10.2012, 27.10.2012, 09.11.2012, 26.04.2013.

(viii) The HVPNL would, in the given facts and circumstances, be entitled to retain 100% of the L.D. Therefore, the approach adopted by the Single Judge is correct. Accordingly, the learned Single Judge has, now, left it open to the disputants to agitate the issue concerning L.D. afresh before the Arbitral Tribunal.

(ix) The J.V. Company is not entitled to seek a refund of 50% of the L.D. [See ***Ramnath International Construction v. UOI*** (2006) SCC OnLine SC

1377 and ***ONGC vs Wig Brothers Builders and Engineers Private Limited*** 2010 SCC OnLine SC 1152]

(x) The J.V. Company ought to have referred the matter to the Dispute Board in the first instance, which it failed to do. Hence, the J.V. Company is estopped from raising fresh grievances.

(xi) The quantification of L.D. was as per Clause 26.2 of the GCC read with Clause 26.2 of the P.C. The heads under which losses were suffered are indicated in paragraph 7.2.6 of the SOD. The L.D. represented a genuine pre-estimate of damages that HVPNL may suffer in case of breach by the J.V. Company, an aspect asserted in paragraph 7.2.7 of the SOD. It was impossible to quantify loss on account of FERV and depreciation; therefore, HVPNL rightly levied L.D.

(xii) That there was a delay in the execution of the contract (s) is evident on perusal of the testimony of CW-1. A perusal of paragraph 65 of the award would show that the learned arbitrator accepted that HVPNL had suffered loss/injury.

(xiii) The Arbitrator is necessarily required to adjudicate the disputes having regard to the periphery drawn by the contract unless the terms contained therein are illegal or unjust. This case does not fall under such a category. [See ***DDA v. R.S. Sharma*** (2008) 13 SCC 80]. In case compensation awarded to an aggrieved party is other than that provided under the L.D. clause, the adjudicating authority would have to hold that the said clause did not represent the genuine pre-estimate of damages that were likely to be suffered in case of breach. In other words, the adjudicating authority would have to come to a conclusion that the L.D. clause, if enforced, would result in imposing unreasonable damages on the defaulting

party [See ***ONGC vs SAW Pipes*** (2003) 5 SCC 705; ***Constructions and Design Services*** case; ***Kailash Nath Associates vs DDA***, (2015) 4 SCC 136; ***Mahanagar Telephone Nigam Ltd vs Tata Communications Ltd.***, (2019) 5 SCC 341 and ***Fateh Chand and Balkishan Das***, 1963 AIR 1405].

(xiv) Lastly, the J.V. Company did not seek extensions in terms of Clause 40 of the GCC, and therefore, HVPNL had rightly retained money against L.D. from the running bills. No interference is called for under Section 37 of the 1996 Act. [See ***Associate Builders vs Delhi Development Authority*** (2015) 3 SCC 49 and ***Ssangyong Engineering vs NHAI*** 2019 SCC OnLine SC 677]

Analysis and Reasons:

26. Having heard the learned counsel for the parties and perused the records, to our minds, what is required to be ascertained is: whether the conclusion arrived at by the learned arbitrator concerning L.D. was based on evidence placed before him. In other words, whether or not the decision was perverse, in the sense that no reasonable person could have arrived at the conclusion, which had been reached in the matter by the learned arbitrator. In this context, it is relevant to consider the issues framed by the learned arbitrator regarding the levy of L.D. by HVPNL. On the core issue concerning the levy of L.D. and its retention, the following four (04) issues were framed by the learned arbitrator:

> *"i. Whether the time did not remain the essence of the contract? If so, to what extent and to what effect? OPC*
> *ii. Whether the delay caused in execution of the project G-09 is attributable to the claimant or to the respondent? Onus of proof on parties.*
> *iii. Whether the Respondent was justified in imposing an L.D. of Rs. 7,25,01,510/-? OPR*

> *iv. Whether the claimant is entitled to refund of the above stated amount or any other amount deducted as Liquidated Damages (L.D.) by the Respondent? OPC"*

27. Insofar as the first issue is concerned, the finding of fact returned by the learned arbitrator was that although *stricto sensu* time was not of the essence, HVPNL reminded the J.V. Company to complete the contract in time. Therefore, the J.V. Company could not have presumed that the delay caused in the contract's completion was of no consequence. The fact that the contract given to Hythro had to be cancelled and then had to be re-tendered, resulting in further delay in the completion of the contract, would not, according to the learned arbitrator, mean that no loss was caused to HVPNL for the delay attributable amongst the other to the J.V. company [See paragraph 42 of the award].

27.1 This finding of the learned arbitrator is required to be seen against the backdrop of his finding that where several parts of a project were awarded to two or more contractors, one contractor could not be mulcted with the entire burden of damages emanating from the delay in the execution of the contract. According to the learned arbitrator, each of the contractors who had contributed to the loss should be made liable to compensate the employer, *albeit* on a *pro-rata* basis, provided that the employer actually suffered a loss. [See paragraph 36 of the award].

28. Therefore, two aspects emerged from the findings that the learned arbitrator recorded.

28.1 First, in the given facts and circumstances, time was not of the essence. That said, because the completion of the contract was delayed, and reminders in that regard had been given to the J.V. Company, it could not be

assumed that HVPNL had not suffered a loss.

28.2 Second, the burden of the resultant loss could not be mulcted solely on one contractor where two or more contractors are involved in executing the project.

29. Concededly, the J.V. Company failed to complete the project within the 450 days allocated for that purpose. The fact that once sub-stations were installed, they could not be commissioned for wheeling power because other contractors still needed to complete the work of laying feeding/transmission lines is also not in dispute. Therefore, according to the learned arbitrator, a certain portion of the delay was undoubtedly attributable to the J.V. Company. This conclusion was arrived at by the learned arbitrator despite the internal recommendations made by HVPNL's Assistant Executive Engineer (AEE) that the delay which occurred post deemed date of commissioning, insofar as the Naneola and Sonta sub-stations were concerned, should be condoned. Notably, the AEE recommended condonation of 429 days (the actual delay being 449 days) and 743 days delay post deemed date of commissioning for the Naneola and Sonta sub-stations, respectively.

29.1 Although the recommendation of the AEE was put to HVPNL's witness, i.e., RW-1, the learned arbitrator, as indicated above, continued to hold, based on his appreciation of the evidence placed before him, that some part of the delay was attributable to the J.V. Company. In this context, the learned arbitrator also took into account the fact that the J.V. Company was neither able to bring on record any communication seeking an extension of time for delay in completing work concerning the Hukmawali sub-station nor had it taken steps to seek an extension of time in accordance with Clause

40 of the GCC.

30. Therefore, the learned arbitrator, even while holding that HVPNL had suffered loss/injury because of the delay attributable to the J.V. Company, did not conclude that the L.D. clause represented a genuine pre-estimate of damages that HVPNL would suffer in the event of a breach.

30.1 It is required to be noticed that neither Clause 26.2 of the GCC nor Clause 26.2 of the P.C. says in so many words that the L.D. provided therein are a genuine pre-estimate of the damages that HVPNL would suffer in case of breach by the J.V. Company. This aspect was introduced *via* the SOD and the affidavit of evidence submitted by HVPNL's witness i.e., RW-1.

30.2 After noting that it had suffered losses under the heads which HVPNL claimed, the learned arbitrator concluded that the exact contribution of loss attributable to ***each contractor*** was not possible. The losses to which the learned arbitrator referred in this regard were those captured in paragraphs 7.2.6(a)(i) to (v) and 7.2.6(b) of the SOD. Briefly, according to HVPNL, it had suffered losses under the following heads: FERV Loss, Loss of Foreign Exchange Variation that was disallowed by the Haryana Electricity Regulatory Commission (HERC) while fixing the tariff, interest during the construction period, and dis-allowance of depreciation in fixation of tariff by HERC on account of delay in capitalization of the project.

30.4 According to the learned arbitrator, the burden of these losses, except for the FERV Loss, had to be shared *pro rata* by each contractor.

30.5 Insofar as the losses set out in paragraph 7.2.6(b) were concerned, as per the learned arbitrator, a rough estimate could have been provided by HVPNL. These losses were costs in the shape of proportionate salary/administrative expenditure incurred on staff deployed and the funds

expended on running vehicles for monitoring the project.

30.6 It is against this background that the learned arbitrator returned a finding of fact that HVPNL had not quantified the loss suffered by it due to delay attributable to the J.V. Company.

31. The learned Single Judge, to our minds, has erred in holding that there is inconsistency in the findings returned by the learned arbitrator. As noted above, the learned arbitrator has drawn a distinction between the difficulty that HVPNL faced in *pro-rata* distribution of the losses/damages that it suffered for which not only the J.V. Company, but other contractors were also responsible, and the losses, that though quantifiable, had not been quantified. Thus, according to the learned arbitrator, the category of losses which were referred to in paragraph 7.2.6 (a)(i) to (v) of the SOD, except for the FERV Loss, were difficult to quantify as they had to be distributed *pro-rata* amongst various contractors who had been tasked with the execution of Project G09. Whereas, the FERV Loss and the losses referred to in paragraph 7.2.6(b) of the SOD, could have been quantified [See paragraphs 67 and 68 of the award].

32. It is against this backdrop that the learned arbitrator adopted the methodology enunciated by the Supreme Court in the ***Construction and Design Services*** case; which is that a "rough and ready method" could be applied for awarding L.D. to HVPNL. The Supreme Court, in that case, directed that the damages should be borne by the disputants in equal measure because it was difficult, as opposed to impossible, to quantify damages.

32.1 The learned Single Judge, however, in our opinion, wrongly concluded that because the ***Construction and Design Services*** case used the expression

"guesswork", such methodology could not be adopted by courts other than the Supreme Court. This view was premised on the learned Single Judge erroneously observing that the Supreme Court had reduced the burden of damages befalling the defaulting party by taking recourse to the powers conferred on it under Article 142 of the Constitution.

32.2 As rightly contended by Mr Singh on behalf of the J.V. Company, the Supreme Court made no such observation and instead concluded that once an adjudicator (i.e., the arbitrator) found that the L.D. did not represent a genuine pre-estimate of damages and that the aggrieved person/entity may suffer on account of the breach committed by the defaulting party concerning a project conceived in public interest, the aggrieved person/entity was entitled to a reasonable compensation, subject to the maximum amount payable under the L.D. clause. It is when such circumstances are present in a given case, that the court could proceed based on "guesswork" with regard to the quantum of compensation to be allowed to the aggrieved party. The following observations made in the ***Construction and Design Services*** case being apposite are set forth hereafter:

> *"15. Once it is held that even in absence of specific evidence, the respondent could be held to have suffered loss on account of breach of contract, and it is entitled to compensation to the extent of loss suffered, it is for the appellant to show that stipulated damages are by way of penalty. In a given case, when highest limit is stipulated instead of a fixed sum, in absence of evidence of loss, part of it can be held to be reasonable, compensation and the remaining by way of penalty. The party complaining of breach can certainly be allowed reasonable compensation out of the said amount if not the entire amount. If the entire amount stipulated is genuine pre-estimate of loss, the actual loss need not be proved. Burden to prove that no loss was likely to be suffered is on party committing breach, as already observed.*

xxxx xxxx xxxx

17. Applying the above principle to the present case, it could certainly be presumed that delay in executing the work resulted in loss for which the respondent was entitled to reasonable compensation. Evidence of precise amount of loss may not be possible but in absence of any evidence by the party committing breach that no loss was suffered by the party complaining of breach, the Court has to proceed on guess work as to the quantum of compensation to be allowed in the given circumstances. Since the respondent also could have led evidence to show the extent of higher amount paid for the work got done or produce any other specific material but it did not do so, we are of the view that it will be fair to award half of the amount claimed as reasonable compensation."

33. As noticed hereinabove, the learned arbitrator did not conclude that the entire amount calculable as per Clause 26.2 of the GCC read with Clause 26.2 of the P.C. represented a genuine pre-estimate of damages that HVPNL could incur if the J.V. Company committed a breach.

33.1 Therefore, in our opinion, the learned arbitrator was well within the bounds of law to employ a "rough and ready method" for awarding a reasonable compensation towards losses/legal injury suffered by HVPNL.

33.2 The fact that HVPNL was partially responsible for the delay emerges upon perusal of the following finding of fact returned by the learned arbitrator:

" The entire delay post deemed commissioning had to be condoned by the respondent as the Claimant could not be said to be responsible for said delay. Delay of certain days stated hereinbefore, even before the deemed date of commissioning was condoned by the respondent wherever the delay was attributable to the Respondent"

34. Furthermore, it is evident upon a perusal of the impugned judgment that the learned Single Judge was not convinced that HVPNL could have

levied L.D. with regard to the project in issue, i.e., Project G09 when it had not embarked on the said path in other contracts, as alluded to hereinabove. The observations made by the learned Single Judge in paragraph 57 of the impugned judgment bring forth this aspect:

"57. In addition to the above, there is also merit in Cobra's contention that the Arbitral Tribunal has not taken into account other similar contracts between the parties where HVPNL had not levied any Liquidated Damages by accepting Cobra's contention that it was not responsible for the delay in commissioning of the project (s)."

35. According to us, although the fact that HVPNL had either not imposed L.D. or imposed minuscule damages in respect of other projects may not have much relevance work *qua* each project is executed based on the terms and conditions provided in the contract governing such projects, it certainly throws up a scenario where the adjudicator/arbitrator may need to employ a rough and ready method to ascertain reasonable compensation payable to the aggrieved person/entity. Rough and ready method/guesswork is a tool available to an arbitrator, which has received the imprimatur not only of the Supreme Court but also of other courts, even before judgment was rendered in the ***Construction and Design Services*** case.

35.1 The underlying rationale appears to be that as long as there is material available with the arbitrator that damages have been suffered, but it does not give him an insight into the granular details, he is permitted the leeway to employ honest guesswork and/or a rough and ready method for quantifying damages [See ***Mohd. Salamatullah and Others vs Government of Andhra Pradesh***, (1977) 3 SCC 590; ***Delhi Development Authority vs Anand and Associates***, 2008 SCC OnLine Del 179; ***Good Value Engineers vs M.M.S.***

Nanda, Sole Arbitrator and Anr., 2009:DHC:5231; ***National Highway Authority of India vs ITD Cementation India Ltd.***, 2010:DHC:404; ***Mahanagar Gas Ltd. vs Babulal Uttamchand and Co.***, 2012 SCC OnLine Bom 1254; ***Bata India Ltd. vs Sagar Roy***, 2014 SCC OnLine Cal 17998].

35.2 Hence, in our view, the learned Single Judge could not have set aside the award on this score.

36. In our opinion, if the award is read carefully, one would find that there is no inherent inconsistency in the award as is held by the learned Single Judge.

37. Besides this, we are of the view that the learned Single Judge could have either sustained the award in its entirety or set it aside. At present, the state of the law appears to be that the Court while exercising powers under Section 34 of the 1996 Act is not invested with the power to relegate the parties to the arbitral tribunal "to agitate the dispute afresh."

38. In her submission to the Court, Ms Luthra accepted this position in the first instance and relied upon the decisions rendered by the Supreme Court in ***The Project Director, National Highways No.45E and 220 & Anr. vs. M. Hakeem & Anr.*** 2021 SCC OnLine SC 473; ***DHBVN vs. Navigant Technologies Pvt. Ltd***., 2021 SCC OnLine SC 157 and ***McDermott International Inc. vs. Burn Standard Co. Ltd***., (2006) 11 SCC 181.

39. It is in the course of the hearing that Ms Luthra revisited her stand by relying upon the judgment of the division bench of this Court, rendered in ***National Highways Authority of India vs Trichy Thanjavur Expressway Ltd.,*** 2023:DHC:5834. The said judgment would have no applicability in the instant case as it expounds on the powers available to the Court under sub-section (4) of Section 34 of the 1996 Act. This provision allows the Court to

give an opportunity to the arbitral tribunal to either resume the arbitral proceedings or take such action as, in the opinion of the arbitral tribunal, will eliminate the grounds for setting aside the arbitral award. The power under this provision is exercised by the Court at its discretion, where it considers that such an approach is appropriate and is backed by a request from one of the disputants. The record shows that no such request was made by either of the disputants, that is, they should be relegated to the arbitral tribunal to reagitate the dispute concerning L.D.

Conclusion:

40. Thus, for the foregoing reasons, we allow the appeal partly, set aside the impugned judgement, and restore the position concerning L.D. as it obtained in the award. In other words, the disputants will share the burden of L.D. in equal measure. Accordingly, the J.V. Company would be entitled to a refund of 50% of L.D. retained by HVPNL, along with interest in terms of the award rendered by the learned arbitrator.

(RAJIV SHAKDHER)
JUDGE

(AMIT BANSAL)
JUDGE

APRIL 10, 2024 / tr